No. 76-1825

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

BRUCE BAKER, PETITIONER

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This is one of two companion cases in which the plaintiffs seek to establish that some 3,500 employees of the San Francisco Unified School District are no longer covered by Social Security. Prior to July 1, 1972, these employees belonged to the San Francisco City and County Employees' Retirement System (SFRS), and they were covered by Social Security as members of a Social Security coverage group known as Group B of SFRS, pursuant to an agreement between HEW and the State of California (Pet. App. 2-3, 9-10).[1] See 42 U.S.C. 418. Pursuant to a

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[1]Group B consists of those employees covered by SFRS who elected Social Security coverage in 1959 (when California entered into the agreement providing for Social Security coverage for SFRS-covered employees) and all of those who thereafter commenced employment in positions covered by SFRS. See 42 U.S.C. 418(d)(6)(C).

California statute effective July 1, 1972, approximately 3,500 members of Group B of SFRS elected to leave the SFRS and to join the State Teachers' Retirement System (STRS) (Pet. App. 10). Although these employees are no longer covered by SFRS, the State, the school district, and the Secretary of Health, Education, and Welfare nonetheless have continued to treat them as members of the established Social Security coverage group. See 42 U.S.C. 418(c)(1), (d)(4).

In the instant case, petitioner, a San Francisco taxpayer, challenged the school district's payment of the employer contributions on behalf of these employees. In the companion case, *RoAne* v. *Mathews*, 538 F. 2d 852 (C.A. 9), several of the teachers themselves requested certification of a class of all 3,500 employees and sought a refund of Social Security contributions made after July 1, 1972, and an end to further deductions from their salaries for Social Security contributions. Both suits were based upon the contention that under 42 U.S.C. 418(d) the employees' Social Security coverage terminated when they left SFRS. The plaintiffs also asserted that continued coverage violated due process and equal protection. In the instant case the district court found against the petitioner on the merits of his claim, deferring to a previous interpretation of the Act by the Secretary (Pet. App. 1-4). In *RoAne* the district court dismissed the complaint for failure to exhaust administrative remedies (Pet. App. 2).

The court of appeals affirmed in both cases (Pet. App. 5-8, 9-12). In *RoAne* it relied on *Weinberger* v. *Salfi*, 422 U.S. 749, to hold that the district court lacked jurisdiction because the plaintiffs had failed to exhaust their administrative remedies (Pet. App. 9-12). In this case the court of appeals found no significant distinction from *RoAne*

(Pet. App. 6); following a petition for rehearing, the court amended the concluding paragraph of its opinion in this case to read (Pet. App. 8):

> We conclude that *RoAne* is controlling and that the district court should not have granted the summary judgment on the merits. The judgment is vacated and the cause remanded with instructions to dismiss for failure of appellants to exhaust their administrative remedies. Above and beyond the reasons stated in our opinion, we question if appellants have standing to prosecute the action.

1. Petitioner contends that exhaustion of administrative remedies should not be required in this case because there is no administrative remedy available to him as a taxpayer (Pet. 7). We agree that the "exhaustion" doctrine as such does not apply to petitioner. But the very fact that he has no administrative remedy indicates, in the circumstances here, that he has no judicial remedy either.

The Act provides a means by which the employees (or beneficiaries) may raise the issue of coverage with the Secretary, have an administrative hearing, and seek judicial review. 42 U.S.C. 405(c)(4)-(8), (g). The Act also provides that the states may raise questions concerning the coverage of state and local employees administratively, and seek judicial review. 42 U.S.C. 418(s), (t). These express provisions for judicial review of state and local government Social Security coverage issues are exclusive. 42 U.S.C. 405(h); see *Weinberger* v. *Salfi*, 422 U.S. 749, 757-760; *Mathews* v. *Eldridge*, 424 U.S. 319, 326-328.

There is no statutory provision authorizing persons other than those for whom administrative remedies are provided to seek judicial review of claims arising under

Title II of the Social Security Act. See 42 U.S.C. 405(g), (h). Cf. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977 (concurring opinion of Mr. Justice Stewart).[2] It follows that the Act provides no jurisdiction to review petitioner's claim.

2. Moreover, petitioner lacks standing as a taxpayer to pursue the instant case. His challenge is not based upon specific constitutional limitations on the taxing or spending power of Congress, or of the school district. Instead, it is based on the provisions of the Social Security Act, or arguably on the Due Process Clause of the Constitution. Accordingly, petitioner's status as a taxpayer is insufficient to establish standing, because there is no logical nexus between his taxpayer status and the assertedly improper nature of the contribution of school district funds to HEW. *United States* v. *Richardson*, 418 U.S. 166, 172-175; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227-228.[3]

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[2]Petitioner attempts to limit recent interpretations by this Court of 42 U.S.C. 405(h) to cases involving "claims for benefits" (Pet. 8). Section 405(h), however, applies to "decisions of the Secretary," and precludes jurisdiction over actions "to recover on *any* claim arising under this subchapter" (emphasis added). Petitioner's suit—challenging the coverage of a group of employees—is a "claim," and the mere fact that this claim has not been made in one of the particular contexts provided for by the Act does not excuse it from the jurisdictional bar. On the contrary, the very purpose of 42 U.S.C. 405 (h) is to channel challenges to administrative decisions on the part of the Secretary through the specific administrative procedures provided by the Act. As this Court observed in *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757, the first two sentences of that statute "prevent review of decisions of the Secretary save as provided in the Act, which provision is made in §405(g)."

[3]These cases have been applied in challenges to spending on the part of local governments as well as on the part of the United States. *Reich* v. *City of Freeport*, 527 F. 2d 666, 670 n. 8 (C.A. 7); *Korioth* v. *Briscoe*, 523 F. 2d 1271, 1277 (C.A. 5). Moreover, taxpayer standing is not necessary in order to insure protection of the rights asserted, since the employers involved are not disabled from asserting their own right in a proper case. See *Warth* v. *Seldin*, 422 U.S. 490, 509-510.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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